91 994

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA

Petitioner,

V.

RENEE J. WELCH

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Superior Court of Pennsylvania erred in holding that testimony specifically relating the fact that defendant/Renee Welch had openly and expressly refused her stepfather's request to allow the police to search her room in the family home for evidence of illicit drugs was inadmissible on the grounds that it comprised an improper comment on her invocation of her rights under the Fourth Amendment to the United States Constitution?

Answered in the negative below.

II. Whether, alternatively, Superior Court erred in failing to consider that the admission of testimony specifically relating the fact that Renee Welch had openly and expressly refused her stepfather's request to allow the police to search her room in the family home for evidence of illicit drugs was harmless error?

Not answered below.

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The September 16, 1991 Order of the Supreme Court of Pennsylvania denying petitioner's petition for allowance of appeal, a copy of which is set forth at Appendix "A", is as yet unreported. The January 23, 1991 Opinion of the Superior Court of Pennsylvania with one concurrence in the result, which is set forth at Appendix "B", is published at 401 Pa. Super. 393, 585 A.2d 517 (1991); *see* 48 CrL 1433 (1991). The January 10, 1990 Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, is set forth at Appendix "C", and is an unpublished slip opinion.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on September 16, 1991, and this petition was filed within ninety (90) days of that date in compliance with Rule 13.1 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent, Renee Welch a/k/a Allyson Renee Welch, was charged by criminal information filed on September 3, 1988, at No. CC 8810301A, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, with two

(2) counts of possession with intent to deliver a controlled substance (heroin and cocaine), 35 Pa.C.S. §780-113(a)(30), two (2) counts of possession of controlled substance, 35 Pa.C.S. §780-113(a)(16), one (1) count of possession of drug paraphernalia, 35 Pa.C.S. §780-113(a)(32), and one (1) count of corruption of minor, 18 Pa.C.S. §6301.

On February 15, 1989, respondent's jury trial before the Honorable Donna Joe McDaniel commenced and respondent was found guilty of all charges on February 17, 1989.

After disposition of post-trial motions, respondent was sentenced on June 22, 1989, to a term of imprisonment of five and one-half (5½) to eleven (11) years, plus a $5,000 fine, for her count one conviction of

possession with intent to deliver, a consecutive term of imprisonment of one (1) to three (3) years, plus a $5,000 fine, for her count two conviction of possession with intent to deliver, and a consecutive term of imprisonment of two and one-half (2½) to five (5) years (to be served consecutive to the sentence imposed at count two), for respondent's count six conviction of corruption of minors. Accordingly, respondent's aggregate term of imprisonment is nine (9) to nineteen (19) years, with a total of $10,000 in fines, plus court costs.

Respondent's appeal to the Superior Court of Pennsylvania resulted in the Order and Opinion of January 23, 1991, vacating judgment of sentence and remanding for new trial. *Commonwealth v. Welch*, 401 Pa. Super. 393, 585 A.2d 517

(1991); *see* 48 CrL 1433 (1991). During the trial a police officer related how respondent refused to allow police to search her room without a warrant when respondent's stepfather asked respondent to allow a search. The Superior Court panel held that respondent's refusal to allow a search of her room was an assertion of her constitutional right to be free from search under the Fourth Amendment of the United States Constitution and that her asserting the right should not be used against her as evidence suggesting guilt. The Superior Court found the testimony regarding respondent's refusal to search in the absence of a warrant inadmissible and reversible error. The Superior Court's conclusion was predicated on its application of an analogy to the

invocation of one's right to silence under the Fifth Amendment of the United States Constitution and its belief that just like assertion of the Fifth Amendment right cannot be used against a person, neither should assertion of a Fourth Amendment right be treated differently. The court premised this ruling on its belief that a refusal to search can be construed as evidence that someone is hiding something to a degree that indicates guilty conscience. *See* Appendix B.

The Commonwealth sought and was denied by Order of September 16, 1991, review by the Supreme Court of Pennsylvania of the reversal and remand for new trial. This petition followed.

B. Concise Statement of the Facts

The factual circumstances underlying the criminal convictions are briefly as follows. On September 2, 1988, Pittsburgh Police received a radio message at approximately 8:00 p.m. to investigate a complaint about a woman named Renee Welch selling drugs outside a residence at 1421 Chicago Street. The officers went to the residence and seeing no one outside knocked on the door and were greeted by respondent's mother and stepfather. The officers were invited into the home after the parents learned that they were there investigating a report concerning respondent.

The mother and stepfather were adamant about discovering the basis of the report and the police, after contacting their station, informed them

that Kevin Welch, respondent's brother, was the complainant who had made the report. Respondent's brother was called downstairs. At first he denied making the call, but later admitted it and went on to describe facts implicating respondent in drug selling activity, telling his parents and police that he reported her activities because he was afraid for the safety of the family from junkies appearing at the house.

Respondent was then called downstairs by her stepfather and confronted with the allegations, which she denied. At that time, *the stepfather* suggested that respondent permit inspection of her room to disprove any allegations of wrongdoing, but respondent refused to consent to a search without a search warrant (N.T. 2/14-17/89, pp. 86-

88, 273-276). *See also* (Appendix C, p. 22a, 25a-26a; Slip Op. McDaniel, J., 1/10/90, p. 2, 4; finding it was the stepfather who initiated the request to search). The police then told respondent not to return to her room while they obtained a warrant and they began advising the parents.

Testimony indicates that respondent's nephew, Francisco Martinez, age 10, conversed with respondent and then went upstairs. The nephew was then chased downstairs with respondent's brother at his heels and yelling that the nephew had the drugs. One of the officers intercepted the boy with a bear hug and balloons of suspected narcotics began falling to the floor from the nephew, who became hysterical crying,

"Renee [respondent] is going to kill me. I screwed up."

In response to finding the balloons, respondent's mother told the young boy to show the police where he had gotten the drugs and he took one of the officers to respondent's room upstairs. Respondent was then arrested and a search warrant was obtained and additional evidence was seized. A Commonwealth expert testified that the amount of drugs found, 2.377 grams of heroin and 2.869 grams of cocaine, plus the packaging and bus and plane tickets all were indicia consistent with the sale of drugs.

REASONS FOR GRANTING THE WRIT

I. SUPERIOR COURT OF PENNSYLVANIA ERRED IN HOLDING THAT TESTIMONY SPECIFICALLY RELATING THE FACT THAT RENEE WELCH HAD OPENLY AND EXPRESSLY REFUSED HER STEPFATHER'S REQUEST TO ALLOW POLICE TO SEARCH HER ROOM IN THE FAMILY HOME FOR EVIDENCE OF ILLICIT DRUGS WAS INADMISSIBLE ON THE GROUNDS THAT IT COMPRISED AN IMPROPER COMMENT ON HER INVOCATION OF HER RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The protections afforded the Fifth Amendment have not been extended by this Court to require that the assertion of the right to refuse a search under the Fourth Amendment cannot be referred to at trial or that such a referral is an infringement on Fourth Amendment rights. Here, the Superior Court of Pennsylvania erroneously held, by analogy to the Fifth Amendment, that admission of testimony

concerning respondent's refusal to allow a search of her room was prohibited under the Fourth Amendment, because of its belief that the Fourth Amendment protects, in addition to the actual search, a refusal to search, which the court felt can be construed as evidence of guilty conscience. Just as this Court has never required that warnings need be given prior to the exercise of a person's rights under the Fourth Amendment, neither has this Court mandated that assertion of those rights need be shrouded in secrecy.

During the course of her testimony, Officer Kathryn Degler related how respondent refused to allow police to search her room without a warrant when respondent's stepfather asked respondent

to allow a search (N.T. 2/14-17/89, pp. 85-89). As a preliminary matter, the Commonwealth respectfully submits that because the request to search was put forth by a private individual, the stepfather, Fourth Amendment prohibitions against unreasonable searches and seizures are inapplicable here. The Fourth Amendment, "proscrib[es] only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94 (1985); *Commonwealth v. Dembo*, 451 Pa. 1, 301 A.2d 689 (1973). This was a request by

a private individual to have the respondent subject herself to a search of her room by the police.[1] The police did

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[1] Superior Court ignored this lack of police action involving respondent's refusal to search by stating, "it was suggested by someone that if the allegations were false then she [respondent] ought to allow the police to inspect her room." (App. "B", p. 5a; 585 A.2d at 518). This innocuous reference to "someone" misstates the record which clearly shows it was respondent's stepfather, Mr. Rollerfellow, that initiated the request to search (N.T. 2/14-17/89, pp. 85-89, 273, 276). Judge McDaniel clearly found it was the stepfather, a third party, not the police, which made the request (App. "C", 22a, 25a-26a; Slip Op. at 2, 4). Further, respondent's brief before Superior Court openly acknowledged "Mr. Rollerfellow had said to [respondent] at the time, 'if you have nothing to hide, why not let the police look through your room?'." *See* Brief for Appellant at 51. Regardless that Superior Court declined to state it was respondent's stepfather which made the request, it is evident from a plain reading of its Opinion even Superior Court was aware it was not the police when it referred to "someone." Therefore, Superior

not initiate the request by the stepfather, who of his own accord made the request of the respondent. The police did not, therefore, initiate governmental action that is within the meaning of the Fourth Amendment. The grounds for reversal by the Pennsylvania Superior Court rely on what it found to be a violation of the Fourth Amendment when a private individual, without police intervention or solicitation, requested the respondent to consent to a search of her room.

At the time of the stepfather's request, the motivation behind the stepfather's actions was his own desire to facilitate the inquiry into the accusation of drug activity made by

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Court's holding and respondent's claim to Fourth Amendment protection under the circumstances is ill-founded.

respondent's brother and was not in response to a request by police to initiate a search at that time. However, the stepfather's personal motive in this matter is insignificant, because any rule in this case ought to be grounded on the facts that actually occurred. Regardless of what his motives might have been, plainly he was not acting on behalf of the police or government. The red herring is that the end result is a police search. That does not really matter as long as there is no dispute or way to characterize the stepfather's request to respondent to permit a search as police action. Here, the record clearly shows that the request to search was an invention of the stepfather's own desire to get to the bottom of the matter. All that matters is that he made

the request of his own accord, not the police. Moreover, not only was the request to search here made by a private individual, but it was made by an adult parent in his own home, where he was entitled to search himself or even give his consent to search to the police should he choose.

Despite the ill-founded application of the Fourth Amendment by the Pennsylvania courts, the Commonwealth respectfully submits this Court has never required transformation of the right to privacy to a prohibition of evidentiary use of the exercise of the right. The right to refuse entry is equally available to the innocent as well as the guilty. In the Fourth Amendment context, the law has always centered on excluding evidence from a search determined to be

illegal and has made no move to make warnings such as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), for Fifth Amendment purposes extend to other constitutional rights. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), this Supreme Court stated that requiring police advise a person of his right to refuse to consent to a search:

> [I]s a suggestion that has been almost universally repudiated by both federal and state courts, and we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a

logical extension of investigative police questioning.

The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. *Cf. Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274. And, while surely a closer question, these situations are still immeasurably, far removed from 'custodial interrogation' where, in *Miranda v. Arizona, supra,* we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Indeed, in language applicable to the typical

consent search, we refused to extend the need for warnings:

> 'Our decision is not intended to hamper the traditional function of police officers in investigating crime... When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.' 384 U.S., at 477-478, 86 S.Ct., at 1629-1630.

Id. at 231-232, 93 S.Ct. at 2049-2050, 36 L.Ed.2d at 865-866. As a corollary to the foregoing principle in *Schneckloth v. Bustamonte*, this Court has authoritatively held that the question of whether or not a "seizure" implicating

the Fourth Amendment has occurred is not affected by the fact that the police did not expressly tell the individual to whom questions are addressed that he is not free to respond.[2] *I.N.S. v. Delgado,* 466 U.S. 210, 216, 104 S.Ct. 1758, 1762-1763, 80 L.Ed.2d 247, 255 (1984)("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."); *United States v. Mendenhall,* 466 U.S. 544, 555, 100 S.Ct. 1870, 1878, 64

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[2] This Court has deliberately extrapolated this specific principle from the general holding of *Schneckloth v. Bustamonte,* that the voluntariness of a suspect's consent to search is not affected by the failure of the police to tell that he has a right to refuse.

L.Ed.2d 497 (1980)("Our conclusion that no seizure occurred is not affected by the fact that respondent was not expressly told that she was free to decline to cooperate with the inquiry, for the voluntariness of her responses does not depend on her having been so informed."). If the law is as stated by the Pennsylvania courts in the case of Renee Welch, then *Schneckloth v. Bustamonte,* has been reversed and is no longer the law of the land.

Moreover, this Court's holdings in *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which applied the Fifth Amendment to protect a criminal defendant from having his silence used against him and

the use of silence as evidence of guilt, do not apply to the Fourth Amendment right to be free from unreasonable searches, because the refusal to consent to a search could be upon privacy grounds, rather than fear of incrimination.

Here, the police properly investigated a complainant's report of criminal activity by going to the location and were given voluntary admittance into the home by the homeowners, who cooperated with their investigation. The subsequent consensual search was instituted at respondent's mother's request, a homeowner, and probable cause for the valid search warrant existed. Because the searches were legal, with either consent or probable cause, respondent's Fourth

Amendment rights were not infringed. *Cf. Illinois v. Rodriguez*, ___ U.S. ___, 110 S.Ct. 2793, ___ L.Ed.2d ___ (1990). Respondent's actual refusal to permit a search had no bearing on the legal searches that eventually took place and no recognized infringement on respondent's Fourth Amendment rights transpired.

There is an essential distinction between the Fifth and Fourth Amendments. The Fifth Amendment protects the right to silence and the courts have held that by its very nature, the right requires that a person's invocation of this right should not be used against them, because of the adverse inference of guilt through the person's own action such use would invoke. Use or comment on

a person's silence would in effect make his right to silence meaningless. However, the Fourth Amendment's right to not be subjected to "unreasonable" searches and seizures indicates the qualitative, subjective nature of the right, that has been held not to require a warning. While each protects a separate interest, the Fifth Amendment is absolute whereas the Fourth Amendment is qualitative, meaning a person does not always have a right not to be searched -- i.e., when probable cause arises or, as here, when consent is given by a person with authority -- but in contrast always has the right to remain silent. For this reason the Commonwealth believes the action of the Pennsylvania courts in "developing" the law on Fourth Amendment

rights by its holding in this case is erroneous and inappropriately embraces and applies concepts of Fifth Amendment law to the distinctly different situation of search and seizure law. The Pennsylvania courts have gone beyond the United States Supreme Court in applying requirements to a valid search request -- here, most noticeably by a third party -- that have heretofore been only applied to the Fifth Amendment.

In addition to the officer's testimony regarding the refusal to search, the respondent herself was cross-examined on her refusal. In the recent decision of *United States v. McNatt,* 931 F.2d 251, 256-258 (4th Cir. 1991), the Fourth Circuit Court of Appeals found a prosecutor's comment to a jury regarding

a defendant's refusal to consent to a search of his truck was not a violation of the Fourth Amendment, because the comment regarding the defendant's assertion of his rights did not affect his freedom from unreasonable searches:

> Under the fifth amendment, a suspect has the right to remain silent at all times and may not be required to say anything at the time of his arrest, during confinement or at trial. However, under the fourth amendment, a person may not prevent a search of his person or his property. By withholding permission to search, he merely puts the government to the procedural test of proving probable cause to obtain a search warrant.

Id., 931 F.2d at 257. The Fourth Circuit specifically found that the exercise of the defendant's right to refuse permission to search without a warrant could be used against him when the

defendant opened the door by accusing the arresting officer of planting the drugs in his truck. In the present case, respondent took the stand and interjected her defense that she did not have any knowledge of the presence of drugs in her room at the time of the officers' investigation and prior to the police discovering the drugs, and she even implied that her brother had planted the drugs there (N.T. 2/14-17/89, pp. 256-259). Thus, the subsequent questioning by the prosecutor on cross-examination concerning respondent's refusal to search (*Id.*, at 273-276), was relevant, as in *McNatt*, to discredit respondent's claim.

In addition to *Schneckloth v. Bustamonte* and its progeny, the Pennsylvania courts have offended this Court's holding in *South Dakota v.*

Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). In *Neville*, this Court found that a motor vehicle operator's refusal to submit to a blood-alcohol test, after a police officer has lawfully requested it, regardless of the form of the refusal, was not a "compelled" or coerced act within the meaning of the Fifth Amendment because the State gave the defendant the choice of submitting to the test or refusing, and, therefore, the refusal could be used against the defendant at trial. *Id.*, 459 U.S. at 561-564, 103 S.Ct. at 921-923. *Neville* found that since the offer to take the blood-alcohol test was a legitimate request under the law, the fact that the suspect or defendant is given an option to refuse the test does not make the State's action "*less*"

legitimate. *Id.*, 459 U.S. at 563, 103 S.Ct. 922. In addition, *Neville* found use of the refusal did not violate the due process clause because it was not fundamentally unfair for the State to use the refusal to take the test as evidence of guilt, even though the suspect was not specifically warned that his refusal could be used against him at trial. *Id.*, 459 U.S. at 565, 103 S.Ct. 923.

Here, respondent was simply asked by her stepfather to permit a search and she was not compelled at any time to submit to a search. The request by the stepfather was legitimate and even the police could have made such a legitimate request should they have chosen to do so. *See Rodriguez, supra.* Further, as in *Neville,* the police would not have had to warn respondent

concerning what use could be made of her refusal to search. *Neville*'s finding that the Fifth Amendment did not act to prevent use of the refusal due to a lack of coercion is directly analogous to the present use of a refusal to search under the Fourth Amendment and demonstrates the error of the Pennsylvania courts' mistaken reliance on Fifth Amendment law. Simply put, if it doesn't violate the Fifth Amendment to introduce evidence of a motorist's refusal to submit to a blood test, it makes no sense to think that it violates the Fourth Amendment to introduce evidence that an individual refused to consent to the search of her home. Such evidence should not be inadmissible either in the second set of circumstances. Yet, illogically this is

the very ruling of the Pennsylvania appellate courts in this case.

The Commonwealth would note that the Pennsylvania courts' position is not without some support in other jurisdictions and would point to the Ninth Circuit Court of Appeals case of *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), which has made a similar analogy in finding evidence of a refusal to permit a search made to a law enforcement officer should not be admissible because it would unduly penalize invocation of Fourth Amendment rights, and which has been used by a few jurisdictions along this line. *See Garcia v. State*, 103 N.M. 713, 712 P.2d 1375 (1986); *Padgett v. State*, 590 P.2d 432 (Alaska 1979). Each of these cases is distinguishable from the instant

because of the involvement of police action. Moreover, disallowing the use of a refusal to search by relating that right to the right to remain silent allows for unnecessary hampering of legitimate police investigatory techniques in the form of consensual searches, muddying the waters, and possibly allowing a stepping stone to broadening the application of the Fourth Amendment's proscriptions against unreasonable searches to areas not intended. If the refusal to search is itself protected under the Fourth Amendment, a reasonable corollary to the Pennsylvania courts' holding today would be to invoke requirements that police give warnings prior to asking for consensual searches.

The Superior Court of Pennsylvania was not presented with, and did not consider, alternative state grounds for decision; therefore, the Pennsylvania courts' decision is premised exclusively on federal constitutional authority.

II. ALTERNATIVELY, THE PENNSYLVANIA COURTS ERRED IN FAILING TO CONSIDER THAT THE ADMISSION OF TESTIMONY SPECIFICALLY RELATING THE FACT THAT RENEE WELCH HAD OPENLY AND EXPRESSLY REFUSED HER STEPFATHER'S REQUEST TO ALLOW THE POLICE TO SEARCH HER ROOM IN THE FAMILY HOUSE FOR EVIDENCE OF ILLICIT DRUGS WAS HARMLESS ERROR.

Lastly, as an alternative argument only, the Commonwealth would argue that clearly under the circumstances of this case admission of evidence of respondent's refusal to permit a search to a third party was not prejudicial and amounted to harmless error. The proper standard for determining the harmlessness of a constitutional error is whether the appellate court is convinced beyond a reasonable doubt that the error is harmless. *United States v. Hastings,* 461 U.S. 499, 509-510, 103 S.Ct. 1974, 1980-

1981, 76 L.Ed.2d 96 (1983)("Since *Chapman,* [*infra*], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations . . ."); *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826-27, 17 L.Ed.2d 155, 162 (1978). An error is harmless if the appellate court finds that the error could not have contributed to the verdict: "The uncontradicted evidence of guilt must be so overwhelming, and the prejudicial effect of the improperly admitted evidence so insignificant, by comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict."

Commonwealth v. Story, 476 Pa. 391, 417, 383 A.2d 155, 168 (1978).

The evidence of the refusal to permit a search was admissible to impeach respondent's claim that no drugs were present in her room which she had just left, and was relevant to showing the course of events that took place during the investigation involving a hectic family dispute that initiated the investigation. In addition, the evidence of the refusal to permit a search became relevant after respondent took the stand and interjected as a defense that the drugs were not in her room to her knowledge and inferred they were planted in her room by her brother (N.T. 2/14-17/89, pp. 256-259), because the refusal can then show that respondent's actions

of refusing to search was inconsistent with the claim that the evidence had been planted. Further, any prejudice to respondent's credibility that a refusal might give rise to is virtually nonexistent here. Three Commonwealth witnesses testified that respondent whispered to the child Francisco and left the house with the child following. Moments later, Francisco returned to the house, went to appellant's bedroom and unsuccessfully attempted to race downstairs past the police and out the front door. As the drugs were pried from the child's clutched hand, Francisco cried that respondent would "kill him," because he "screwed up." Thus, respondent's credibility and stature were in all likelihood tarnished beyond repair and a passing reference to her refusal to

a search would have little or no effect on the jury's verdict. This evidence of constructive control of the drugs is further heightened by the child's showing, at respondent's mother's insistence, that he retrieved the drugs from respondent's nightstand and purse in her room. Respondent's entire defense was that she had been framed by her brother, a defense the jury did not believe.

Consequently, the Commonwealth urges this Court to exercise its jurisdiction and accept the present appeal where it appears that the Pennsylvania appellate courts have decided the instant case of first impression not in accord with established law and in a manner inconsistent with the record in this case.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that this Court grant the instant petition for a writ of certiorari.

Respectfully submitted,

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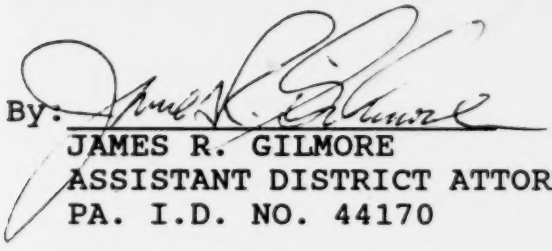
DISTRICT ATTORNEY

KEMAL ALEXANDER MERIÇLI
ASSISTANT DISTRICT ATTORNEY



By: _____
JAMES R. GILMORE
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Attorneys for Petitioner

APPENDIX A

DISPOSITION BY PENNSYLVANIA SUPREME COURT

On September 16, 1991, the Supreme Court of Pennsylvania entered the following Order on the Commonwealth's petition for allowance of appeal in the case of Commonwealth of Pennsylvania v. Renee Welch, A/K/A Allyson Renee Welch, at No. 98 W.D. Allocatur Docket 1991:

"September 16, 1991
Petition Denied
Per Curiam"

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

RENEE WELCH A/K/A
ALLYSON RENEE WELCH,
Appellant

No. 1153 PITTSBURGH, 1989

ORDER

AND NOW, this 23rd day of JANUARY, 1991, it is ordered as follows:

X Judgment of Sentence vacated, remanded for a new trial.

BY THE COURT

s/Eleanor R. Valecko
Deputy Prothonotary

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

RENEE WELCH A/K/A
ALLYSON RENEE WELCH,
Appellant

No. 1153 PITTSBURGH, 1989

Appeal from the Judgment of Sentence of the Court of Common Pleas, Allegheny County, Criminal Division, at No. 8810301A.

BEFORE: OLSZEWSKI, KELLY, AND BROSKY, JJ.

OPINION BY BROSKY, J. FILED: JANUARY 23, 1991

This is an appeal from a judgment of sentence imposed upon appellant after she was convicted on drug charges. Appellant raises eight issues

for our consideration including an argument that it was error to allow testimony regarding the appellant's refusal to allow a search of her room without a warrant. Because we find this issue meritorious we vacate the judgment of sentence and remand for a new trial.

Briefly stated, the facts as they were related at trial and not seriously disputed are: in response to a radio message that an individual named Renee Welch was selling drugs from a certain address, the police went to the described address and knocked on the door. At that time the police spoke with appellant's mother and stepfather about the nature of the visit. Upon learning that the police suspected their daughter of selling drugs they inquired where the

information came from. The police checked with the station and were told that there had been a call from appellant's brother, who also lived at the same address, implicating appellant. Upon hearing this appellant's stepfather called appellant's brother down from upstairs and confronted him with this information. At first the brother denied making the call but he then admitted it and went on to describe facts implicating appellant in drug selling activity. Appellant was then called downstairs and also confronted with the allegations which she denied. At that point it was suggested by someone that if the allegations were false then she ought to allow the police to inspect her room. Appellant refused indicating that she would not allow a warrantless search of

her bedroom. Additional discussions took place during which appellant's nephew came down the steps from the floor containing appellant's bedroom. Appellant's brother then chased the nephew down the steps and yelled "stop him, he's got the drugs" at which time several balloons later found to contain narcotics fell from the nephew's shirt. In response to finding these balloons the nephew was instructed by appellant's mother to take the police upstairs and show them where he got them from. Eventually a search warrant was obtained at which time additional evidence was seized. At trial, one of the officers began testifying to the events as they transpired. As the officer began testifying to appellant's comments regarding searching her room, an

objection was lodged and a sidebar discussion ensued. After hearing arguments of both counsel the officer was allowed to continue testifying at which time the appellant's refusal to allow a search absent a warrant was related.

Appellant argues that it was error to allow testimony regarding her refusal of a search of her bedroom in the absence of a warrant. Counsel made such an argument and in addition to arguing that it was improper to have her refusal used against her, counsel also indicated that the prejudice would greatly outweigh any probative value. We are inclined to agree that it was error to allow such questioning.

It is asserted by appellant's counsel that research of that issue has revealed no cases where the specific

issue before us has been decided. Because we believe this issue is analogous in significant respects to the invocation of one's right to silence, we rely upon the cases discussing this issue.

In Commonwealth v. Haideman, 449 Pa. 367, 296 A.2d 765 (1972), our Supreme Court held that it was reversible error to admit evidence of an accused's request for counsel and silence at arrest. At the time Haideman was decided it was the more prominent view that such evidence was an impermissible impairment upon one's Fifth Amendment right against self incrimination. For instance, in Fowle v. United States, 410 F.2d 48 (9th Cir. 1969), the Ninth Circuit Court of Appeals stated,

> We simply cannot adopt an

> interpretation of the Fifth Amendment under which one exercising his right to remain silent upon and immediately after his arrest - a right which the Supreme Court has so earnestly sought to guarantee and preserve - is severely prejudiced by recourse to that cherished right. It would be anomalous indeed if honorable law enforcement officers were required to elaborate upon the traditional fifth amendment warning and advise arrested persons, in effect: If you say anything it may be used against you. You have the constitutional right to remain silent, but if you exercise it, that fact may be used against you.

The Seventh Circuit Court of Appeals made similar observations stating, "[t]he testimony elicited here could well have led the jury to infer guilt from defendant's refusal to make the statement. We think exercise of a constitutional privilege should not incur this penalty." United States v. Kroslack, 426 F.2d 1129, 1130-31 (7th

Cir. 1970). Although in the present case we are dealing with an assertion of a different constitutional right, the freedom from warrantless searches, we feel the same reasoning must apply to the assertion of that right.

As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right, the overriding tone is that it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches

and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt. To allow such testimony essentially puts the individual in the same kind of no win situation that would exist if the above outlined decisions would be forced to choose between speaking after arrest at the expense of possibly incriminating himself, or refusing to speak and having this fact brought up at trial, thereby inferentially incriminating himself. With respect to a search, one would have to choose between allowing a search of one's possessions, or having the refusal

be construed as evidence that one was hiding something. To the extent an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.

The Commonwealth argues that the cases regarding the Fifth Amendment right of silence should not be applied analogously to the present case as the Fourth Amendment right is not an absolute one, but only a qualified one. The argument continues asserting that one has an absolute privilege of silence but not an absolute right not to be searched. We find this argument unavailing. Although

one may not have an absolute right not to be searched the guarantee of the Fourth Amendment is no less absolute. It protects one from unreasonable searches and seizure. This protection is just as absolute as the right to remain silent, although it may require more case-by-case definition or exposition. However, even the Fifth Amendment has required much development by caselaw and has several nuances. For instance, the amendment itself does not indicate one can invoke the right at the time of arrest and at any point thereafter, rather, this premise has been developed through caselaw. Similarly, the per se unreasonableness of warrantless searches, absent certain policy exceptions, has been firmly ensconced in our constitutional caselaw history.

Although certain occasions may develop where a warrantless search is allowable, the general proposition that a warrant is necessary still prevails and, we think, is as absolute as the right to remain silent. In any event, we think this argument is very misguided. The point of significance is that one should not be penalized for asserting a constitutional right. It is the assertion of a right that we must focus on. We believe that the assertion of a right cannot be used to infer the presence of a guilty conscience. Thus, the actual entitlement to the right could be thought of as irrelevant to the point we are discussing. We would think that the same reasoning would apply even if the individual asserting the right had a mistaken belief that they were protected

by a constitutional provision or were extended a right or protection when, in fact, they were not. The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt.

Regardless of whether such testimony is inconsistent with the constitutional protection we would find an abuse of discretion in allowing the evidence in any event. It is hornbook law that evidence will be considered inadmissible if its prejudicial effect outweighs its probative value. We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are

many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence. However, apparently all involved in the present case agree that a jury is likely to infer this fact from the refusal. Indeed, the Commonwealth seems to argue that this is inferable from the refusal. The district attorney states in the brief presented to this court "the inference that appellant was

hiding something was the superseding basis for relevancy grounds to show appellant's scienter." Commonwealth's brief, at page 66. As the Fifth Circuit Court of Appeals argued, "[w]e would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." Walker v. United States, 404 F.2d 900, 903 (5th Cir. 1968). We believe the same effect would follow from one's refusal to allow a search of one's residence or possessions. Thus, the trial court should have prevented this line of questioning when a timely objection was made.

For the above reasons we believe it was reversible error to allow the testimony regarding appellant's refusal to consent to a search in the

absence of a warrant. Therefore, we vacate the judgment of sentence and remand for a new trial.

Judgment of sentence vacated, remanded for new trial.

Jurisdiction is relinquished.

KELLY, J. Concurs in the Result.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

RENEE WELCH

NO. CC 8810301

OPINION

Donna Jo McDaniel, Judge

January 10, 1990

The defendant, Renee Welch, aka Allyson Renee Welch, was charged at CC8810301 with two (2) counts of Possession with Intent to Deliver Controlled Substances, Drugs, Device or Cosmetic, 35 P.S. §780-113(a)(30); two

(2) counts of Possession of Controlled Substance, 35 P.S. §780-113(a)(16); one (1) count of Possession of Drug Paraphernalia, 35 P.S. §780-113(a)(32; and, one (1) count of Corruption of Minor, 18 Pa. C.S. §6301.

Pre-trial motions were heard and ruled upon immediately before trial on February 15, 1989. The defendant was tried by a jury and found guilty of all charges. Post trial motions were filed and denied.

On June 22, 1989, the defendant was sentenced to consecutive terms of incarceration for 5-½ to 11 years, 1 to 3 years and 2-½ to 5 years for a total period of 9 to 19 years. The defendant has appealed the Judgment of Sentence to the Superior Court.

In her Motion for New Trial or Arrest of Judgment, the defendant alleges that (1) it was error to allow questions about the defendant's refusal to allow a search; (2) it was error to prohibit the defendant from impeaching the Commonwealth witness with a prior drug conviction; (3) it was error to admit the hearsay statements of the defendant's nephew; (4) it was error to admit evidence seized after police had been in the defendant's home for an hour; and (5) it was error to not sequester the jury.

The evidence in this case established that on September 2, 1998, Pittsburgh Police Officers were sent to 1421 Chicago Street on a call that someone was selling drugs. The name of the defendant had been given to the dispatcher.

Upon arrival, the police were greeted by the defendant's mother and stepfather who were surprised but insisted on pursuing who had made the call. The defendant's brother, Kevyn Welch, admitted that he called and stated that the defendant was selling drugs from the house.

The defendant was called downstairs and confronted by her parents. She denied everything. Her stepfather said if she didn't have drugs she would [sic] allow the police to go to her room. The defendant refused a search of her room without a warrant.

The police told the defendant that she could not return to her room before they obtained the warrant. The defendant left the house. She was

followed by her young nephew who shortly returned and went upstairs.

While the police were advising the parents, the nephew came running down the steps followed by Kevyn Welch who was yelling to stop him. The police stopped him and found that he was holding many little balloons some of which fell. The young boy said, "Oh, no, Renee's going to kill me. I screwed up."

The grandmother told the boy to show the police where he had gotten the balloons. The boy took the police to the defendant's bedroom and said he had gotten the balloons from the defendant's purse and night stand. Kevyn Welch entered the room and took empty balloons from another drawer.

The defendant was arrested. A later search of her room, with a warrant,

produced bus and plane tickets and plastic baggies and balloons with heroin and residue of heroin. The tickets were trips between Pittsburgh and New York and were in various names used by the defendant.

The total amount of the drugs involved in the case were 2.377 grams of heroin and 2.869 grams of cocaine. A Commonwealth witness, qualified as an expert, testified that the drug amounts, the packaging and the tickets all were indicia consistent with the sale of drugs.

On direct examination, the defendant testified that the drugs found in her room were not hers, and she had not seen them before. She further testified that she had been in her room immediately before the confrontation with

her parents and the police. On cross-examination, the prosecutor asked the defendant if she remembered someone suggesting to her that if she had nothing to hide, she would let the police search. The witness did remember that question but denied that she knew drugs were in her room.

The defendant claims that the above questions were an improper attack on her constitutional right to require a search warrant before consenting to a search. The cross-examination, however, was not a reference to her demand for a search warrant. It was proper impeachment of her claim that no drugs were present in the room that she had just vacated. Furthermore, the comments were made by a third-party, not the

police, and, therefore, no fourth amendment rights were implicated.

A witness may be impeached on the basis of past convictions, but only if the convictions involve crimes of dishonesty or false statements. Commonwealth v. Yost, 478 Pa. 327, 386 A.2d 956 (1978). The defendant wished to impeach the Commonwealth's witness her brother, with his prior conviction for possession of marijuana with intent to deliver. That conviction was not of a crime which involved dishonesty and was, therefore, properly excluded. The defendant, moreover, was permitted to cross-examine the witness about a different conviction in an effort to show a corrupt motive for testifying against her.

Statements made by the defendant's nephew were admitted under the excited utterance exception to hearsay. The defendant argues that this was error.

The res gestae or excited utterance exception to the hearsay rule was defined in Allen v. Mack, 345 Pa. 407, 28 A.2d 783 (1942) to be:

> "...a spontaneous declaration by a person whose mind had been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to

> exclude the likelihood of its having emanated in whole or in part from his reflective faculties." Id at 410.

The facts of this case precisely correspond with the definition of an excited utterance. Thus, the nephew's statements were properly admitted into evidence.

The defendant's argument that police need probable cause in order to remain in a home while investigating a criminal complaint is frivolous and devoid of merit. Her final argument that it was error to not sequester the jury also must fail.

Pennsylvania Rule of Criminal Procedure 1111(a) provides:

> "The trial judge may, in [his] discretion, order sequestration of

trial jurors in the interest of justice." The discretion of the trial court will not be disturbed unless there is prejudice shown. Commonwealth v. Sourbeer, ___ Pa. ___, 422 A.2d 116 (1980).

The defendant argues that there must be a presumption of prejudice since the media, at the time of trial, was focused on the death of the defendant's nephew while carrying drugs on his person.

A presumption will not suffice to show that the defendant was prejudiced. Moreover, this Court's precaution of specifically questioning the jurors each day and admonishing them each night served to protect the interest of justice and the defendant's right.

For all of these reasons, the defendant's post trial motion was denied.

By the Court

\s\ McDaniel,J.
J.

January 10, 19907